(3)

No. 08-1437

In the Supreme Court of the United States

TIMOTHY J. RUSSELL AND ANITA L. RUSSELL,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ELENA KAGAN
Solicitor General
Counsel of Record
JOHN A. DICICCO
Acting Assistant Attorney General
BRUCE R. ELLISEN
PATRICK J. URDA
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether 26 U.S.C. 7425(b)(1), which provides for the preservation of a federal tax lien when the United States does not receive notice of a nonjudicial sale of property subject to the lien, bars the post-sale extinguishment of the lien under state law.

TABLE OF CONTENTS

Page

Opinion below 1
Jurisdiction 1
Statement 2
Argument 4
Conclusion 10

TABLE OF AUTHORITIES

Cases:

Burton v. *Smith*, 38 U.S. (13 Pet.) 464 (1839) 5
Crosby v. *National Foreign Trade Council*, 530 U.S. 363 (2000) 4
First Am. Title Ins. Co. v. *United States*, 848 F.2d 969 (9th Cir. 1988) 8, 9, 10
Orme v. *United States*, 269 F.3d 991 (9th Cir. 2001) 6
Security Pac. Mortgage Corp. v. *Choate*, 897 F.2d 1057 (10th Cir. 1990) 4, 6, 9
Tompkins v. *United States*, 946 F.2d 817 (11th Cir. 1991) 8, 9, 10
United States v. *Bess*, 357 U.S. 51 (1958) 5
United States v. *Williams*, 514 U.S. 527 (1995) 7

Statutes:

26 U.S.C. 6321 5
26 U.S.C. 6322 ..... 3, 5, 7
26 U.S.C. 7425 ..... 6, 7, 9
26 U.S.C. 7425(b) 4, 6, 9
26 U.S.C. 7425(b)(1) 3, 5, 6, 9
26 U.S.C. 7425(b)(2) 5

Statutes—Continued: Page

26 U.S.C. 7425(c)(1) 3, 5
26 U.S.C. 7425(d) 3
28 U.S.C. 2410 7
28 U.S.C. 2410(a) 7
28 U.S.C. 2410(c) 7
Colo. Rev. Stat. (2006):
§ 38-38-506 ..... 2, 3, 4, 5, 6
§ 38-38-506(2)(a) 3

Miscellaneous:

H.R. Rep. No. 1884, 89th Cong., 2d Sess. (1966) 8
S. Rep. No. 1708, 89th Cong., 2d Sess. (1966) 8

In the Supreme Court of the United States

No. 08-1437

TIMOTHY J. RUSSELL AND ANITA L. RUSSELL,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 551 F.3d 1174.

JURISDICTION

The judgment of the court of appeals was entered on December 19, 2008. On March 11, 2009, Justice Breyer extended the time within which to file a petition for a writ of certiorari to and including April 18, 2009. On April 6, 2009, Justice Breyer further extended the time to May 18, 2009, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In August 2003, Ashcroft Homes, Inc., obtained a construction loan in the amount of $506,400 from U.S. Bank. The loan was secured with a deed of trust to certain real property in Colorado. In July 2004, the Internal Revenue Service (IRS) filed a notice of federal tax lien against Ashcroft Homes in the amount of $160,353.09, and the county clerk recorded the lien. On October 24, 2004, U.S. Bank assigned the deed of trust to Timber Creek Holdings, L.P. Pet. App. 2a.

Ashcroft Homes defaulted on the U.S. Bank loan, and Timber Creek commenced foreclosure proceedings in February 2005. On April 13, 2005, the Public Trustee of El Paso County, Colorado, conducted a foreclosure sale at which Timber Creek purchased the property for $630,987.94. The United States was not provided with notice of the foreclosure sale. In November 2005, Timber Creek sold the property to petitioners. Pet. App. 2a.

2. In March 2007, petitioners filed a quiet-title action against the United States in the United States District Court for the District of Colorado. Pet. App. 2a. Petitioners noted that, under Colorado law, Colo. Rev. Stat. § 38-38-506 (2006), the interest of an "omitted party" who is not notified of a foreclosure sale may be terminated if the party is given a right to redeem, or purchase, the property. Petitioners asserted that the United States was such an "omitted party," and that the government was therefore required either to redeem or to forfeit its tax lien. Compl. ¶¶ 5, 8.

The government moved to dismiss the suit as barred by federal law. It explained that, under federal law, if property on which the United States has a lien is sold at a nonjudicial sale, the tax lien remains attached to the property where, as here, the United States had filed a

notice of the lien at least 30 days before the sale and did not receive timely notice of the sale. Gov't Mem. in Support of Mot. to Dismiss 3-4; see 26 U.S.C. 7425(b)(1) and (c)(1). The government also observed that, after a federal tax lien arises, federal law provides that the lien "continues to remain attached unless the liability for the underlying federal tax assessment is satisfied or becomes unenforceable." Gov't Mem. in Support of Mot. to Dismiss 4 (citing 26 U.S.C. 6322). The government argued that, to the extent Colorado law would otherwise have the effect of extinguishing a federal tax lien that remained attached to the property under federal law, Colorado law was inconsistent with federal law and could not control. *Id.* at 5.

The district court denied the motion to dismiss and subsequently entered judgment in favor of petitioners. Pet. App. 14a-16a. The court held that, under Colorado law, and pursuant to federal law governing the United States' right of redemption, the United States had 120 days to pay $710,959.42 to redeem the property. *Id.* at 15a-16a (citing Colo. Rev. Stat. § 38-38-506(2)(a), and 26 U.S.C. 7425(d)). The court further held that, if the United States failed to redeem, title to the property would be quieted in petitioners "free and clear of any claim of lien" by the United States. *Id.* at 16a.

3. The court of appeals reversed. Pet. App. 1a-13a. The court of appeals agreed with the government that federal tax law preempts any application of Colo. Rev. Stat. § 38-38-506 that would require the United States to redeem or forfeit its federal tax lien when it did not receive the required notice of a nonjudicial sale. Relying on the text and legislative history of 26 U.S.C. 7425(b)(1), the court found it "clear" that "Congress intended federal law to 'occupy the field'" with respect to

the preservation of tax liens when property is sold without proper notice to the United States. Pet. App. 8a-10a. The court concluded on that basis that Section 7425(b) "dictates the method for discharging a tax lien when the underlying property is sold." *Id.* at 10a (quoting *Security Pac. Mortgage Corp.* v. *Choate*, 897 F.2d 1057, 1058 (10th Cir. 1990)). The court further held that "Colorado law is naturally preempted where notice is not given to the government as a lien holder" because "the remedy in Colo. Rev. Stat. §§ 38-38-501 and 38-38-506, which requires extinguishment of the government's lien if it fails to redeem the property, conflicts with the remedy provided in § 7425(b), which preserves the government's lien." *Id.* at 10a-11a.

ARGUMENT

Petitioners contend (Pet. 16-26) that the federal tax lien on their property must be extinguished as a matter of state law unless the United States chooses to exercise a state-law right of redemption. The court of appeals correctly rejected that contention as inconsistent with federal tax law, and its decision does not conflict with any decision of this Court or of any other court of appeals. Further review is not warranted.

1. The court of appeals correctly held that the Colorado omitted-party statute, Colo. Rev. Stat. § 38-38-506, as applied to the federal tax lien at issue in this case, conflicts with federal tax law and is therefore preempted. See, *e.g.*, *Crosby* v. *National Foreign Trade Council*, 530 U.S. 363, 372 (2000) ("[S]tate law is naturally preempted to the extent of any conflict with a federal statute.").

A federal tax lien arises in favor of the United States if "any person liable to pay any tax neglects or refuses

to pay the same after demand," and the lien attaches to "all property and rights to property, whether real or personal, belonging to such person." 26 U.S.C. 6321. Once a tax lien attaches to a taxpayer's property, it generally remains attached "until the liability for the amount so assessed * * * is satisfied or becomes unenforceable by reason of lapse of time." 26 U.S.C. 6322. A transfer of the property after a tax lien has attached "does not affect the lien, for 'it is of the very nature and essence of a lien, that no matter into whose hands the property goes, it passes cum onere.'" *United States* v. *Bess*, 357 U.S. 51, 57 (1958) (quoting *Burton* v. *Smith*, 38 U.S. (13 Pet.) 464, 483 (1839)).

If property as to which the government has or claims a lien is sold in a nonjudicial sale, and proper notice was given to the government, federal law provides that state law governs the discharge or divestiture of the tax lien. 26 U.S.C. 7425(b)(2). But if no such notice is given, then the sale is "made subject to and without disturbing such lien." 26 U.S.C. 7425(b)(1); see 26 U.S.C. 7425(c)(1).

Under Colorado law, if a party has a recorded interest in foreclosed property but is not notified of the public trustee's foreclosure sale, that party's interests may be terminated so long as the party is afforded rights of cure or redemption. Colo. Rev. Stat. § 38-38-506 (2006). That statute thus requires a so-called omitted party to make one of two choices: either exercise its right to redeem the property, or forfeit its interest in the property.

The court of appeals correctly concluded that Colo. Rev. Stat. § 38-38-506, "which requires extinguishment of the government's lien if it fails to redeem the property, conflicts with the remedy provided in § 7425(b), which preserves the government's lien." Pet. App. 11a. Federal law thus bars Colorado law from operating to

terminate the federal tax lien on petitioners' property. *Id.* at 13a.

2. a. Petitioners contend (Pet. 18-20) that the court of appeals erred in concluding that Congress intended to "occupy the field" with respect to the discharge of federal tax liens. Although the court noted that "Congress intended federal law to 'occupy the field' in resolving * * * federal tax lien issues" related to Section 7425, it did so in the course of explaining that Section 7425(b) "dictates the method for discharging a tax lien when the underlying property is sold." Pet. App. 10a (quoting *Security Pac. Mortgage Corp.* v. *Choate*, 897 F.2d 1057, 1058 (10th Cir. 1990)). That observation is both correct and unremarkable. See *Orme* v. *United States*, 269 F.3d 991, 994 (9th Cir. 2001) (in enacting Section 7425(b), "Congress has spoken clearly on the divestiture of federal tax liens in sales of property"). And as petitioners themselves acknowledge, Section 7425 specifies that "a lien is *not* to be discharged * * * when the government has not received notice of a foreclosure." Pet. 19.

b. Petitioners also contend (Pet. 21-22) that Colo. Rev. Stat. § 38-38-506 does not conflict with Section 7425(b)(1). Petitioners argue that Section 7425(b)(1) explicitly prohibits discharge of a federal tax lien only at the moment of a nonjudicial sale of which the United States was not notified, and that it does not bar a State from terminating a federal tax lien thereafter. That argument lacks merit. Contrary to petitioners' suggestion (Pet. 21), federal law is not "silent" on the question of post-sale discharges. Rather, federal law provides that a tax lien attached to a taxpayer's property generally remains so attached "until the liability for the amount * * * assessed * * * is satisfied or becomes

unenforceable by reason of lapse of time." 26 U.S.C. 6322.

There is likewise no merit to petitioners' suggestion (Pet. 21) that 28 U.S.C. 2410 contemplates post-sale discharges of federal tax liens under state law. Section 2410 authorizes suit against the United States to, *inter alia*, quiet title to property on which the United States claims a lien, or to foreclose a mortgage or other lien on such property. 28 U.S.C. 2410(a). Section 2410 also provides that a judgment in such an action "shall have the same effect respecting the discharge of the property from the mortgage or other lien held by the United States as may be provided with respect to such matters by the local law of the place where the court is situated." 28 U.S.C. 2410(c). But as the court of appeals correctly explained, those general provisions authorizing suit against the United States "do not affect [the] conclusion that Congress, in enacting § 7425(b), intended federal law to apply when the government fails to receive notice of a nonjudicial sale." Pet. App. 13a.*

Petitioners' reliance (Pet. 22) on the legislative history of Section 7425 is also misplaced. The congressional committee reports explained:

> Where foreclosures covered by this provision are made without proper notice to the Government, the bill provides that this does not affect the Govern-

---

* Petitioners contend (Pet. 19-20) that, in its brief in *United States* v. *Williams*, 514 U.S. 527 (1995), the government "acknowledged that quiet title suits brought under [Section 2410] may be used to discharge federal tax liens pursuant to state law." The government's brief in that case, however, merely stated that "[t]he procedural validity of [a] federal tax lien, but not the validity of the underlying assessment, may be adjudicated in [a Section 2410 quiet-title] action." U.S. Brief at 17, *Williams*, *supra* (No. 94-395).

> ment's claim under a tax lien (as where the Government is not joined in a judicial foreclosure). In these cases, the Government's claim continues against the property into the hands of a third party.

S. Rep. No. 1708, 89th Cong., 2d Sess. 28 (1966); H.R. Rep. No. 1884, 89th Cong., 2d Sess. 26 (1966). The reports did not suggest that Congress intended to permit States to extinguish the government's claim against the property in the wake of an unnoticed nonjudicial sale.

c. Finally, petitioners observe (Pet. 22-25) that "Colorado's omitted-parties statute affords the government the same rights it would have been afforded if it had notice of the sale." But that does not mean that the State may now put the government to the choice of redeeming the property or forfeiting its federal tax lien, even though the government was not informed of the sale before it was completed. See *Tompkins* v. *United States*, 946 F.2d 817, 821 (11th Cir. 1991) ("The survival * * * of inferior federal tax liens is the penalty Congress intended to impose on senior lienholders who fail to give the presale notice prescribed by section 7425. This penalty allows the IRS to maintain the status quo of its lien, as well as to benefit from future increases in the value of the property.") (citing *First Am. Title Ins. Co.* v. *United States*, 848 F.2d 969, 972-973 (9th Cir. 1988)).

3. Petitioners contend (Pet. 7-15) that this Court's review is warranted to resolve a conflict between the decision below and the decisions of the Ninth and the Eleventh Circuits in *First American Title* and *Tompkins*. That contention lacks merit.

In both *First American Title* and *Tompkins*, the courts ruled that, where a senior lienholder failed to give notice to the government of a nonjudicial sale, Sec-

tion 7425(b)(1) did not preclude the courts from applying an equitable exception to the general rule that a senior lienholder's lien merges into the fee when the lienholder purchases property at a foreclosure sale. *First Am. Title*, 848 F.2d at 971-973; *Tompkins*, 946 F.2d at 819-820. Both courts acknowledged that granting equitable relief would have the effect of preserving the pre-sale priority of the purchaser's lien over a federal tax lien. The courts reasoned that such relief would not conflict with Section 7425, which forbids the discharge of federal tax liens after an unnoticed nonjudicial sale but does not resolve questions of lien priority. *Ibid.*

Those decisions are consistent with the law in the Tenth Circuit. As the court of appeals noted in this case, the Tenth Circuit had also previously concluded that Section 7425(b) does not preclude the application of state-law remedies merely because they would affect the relative priority of a federal tax lien after an unnoticed judicial sale. See Pet. App. 12a; see also, *e.g.*, *Security Pac.*, 897 F.2d at 1058. But as the court further noted, this case presents a different question: namely, whether Section 7425(b) forbids a State from terminating a federal tax lien altogether. See Pet. App. 12a.

Petitioners suggest (Pet. 14-15) that *First American Title* and *Tompkins* nevertheless conflict with the decision below because the courts in those cases determined that Section 7425(b) did not preclude the availability of post-sale relief under state law. But the court of appeals in this case did not hold that Section 7425(b) precludes *all* post-sale relief under state law; it held only that Section 7425(b) precludes post-sale remedies that operate to extinguish a federal tax lien. See Pet. App. 10a-11a. Contrary to petitioners' suggestion (Pet. 13), neither *First American Title* nor *Tompkins* is inconsistent with

that holding. See *First Am. Title*, 848 F.2d at 972-973 (explaining that, in the absence of notice, "the government's liens survive the sale, leaving an encumbrance on the property," and that the preservation of the government's lien "is the penalty that Congress intended to impose on senior lienors" who fail to provide the required notice); accord *Tompkins*, 946 F.2d at 821.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELENA KAGAN
Solicitor General
JOHN A. DICICCO
Acting Assistant Attorney General
BRUCE R. ELLISEN
PATRICK J. URDA
Attorneys

AUGUST 2009